PETALING TIN BHD.

v.

LEE KIAN CHAN & 2 ORS.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HAJI MOHD
JEMURI SERJAN CJ (BORNEO),
TAN SRI DATUK EDGAR
JOSEPH JR. SCJ,
DATO' MOHAMED DZAIDDIN BIN
HJ. ABDULLAH SCJ
[CIVIL APPEAL NO. 02-540-1993]
5 MARCH 1994

COMPANY LAW: Take-over and mergers - Appellant a public listed company quoted on KL Stock Exchange - Obligations and restrictions - Shares held by concert parties - Rules 34.1 & 34.7 of the Code on Take Overs and Mergers 1981 - Ruling by Panel on Take over and Mergers - Legal obligation to extend mandatory general offer to shareholders of appellant - No such offer made - Application for transfer of shares - Approval of the Panel not obtained - imposition of public censure by Panel - Section 179(7A) of the Companies Act 1965 - Statement by the Panel that neither the obligation nor the restriction was any longer applicable - Preliminary issues - Whether the High Court had jurisdiction - Ouster clause - Section 179(8) of the Act - Whether applicable - whether controversy justiciable - Whether the Panel should have been joined as a party - Whether declaratory proceedings appropriate - Substantive issue - Whether concert parties released from their obligations and restrictions Panel's rulings.

PRACTICE AND PROCEDURE: Jurisdiction - Ouster clause - Section 179(8) of the Companies Act 1965 - Statement of the Panel on Take Overs and Mergers, that concert parties released from their obligations and restrictions under rr. 34.1 and 34.7 of the Code on Take Overs and Mergers 1981 - Whether jurisdiction of the High Court ousted - Statement - Whether decision or mere opinion; controversy between the parties - Whether justiciable - justiciability - Meaning of - Whether controversy real and substantial - The Code - Whether a "mere gentlemen's guide;" the Panel not joined as a party to the proceedings - Effect; declaratory proceedings - Whether appropriate.

The appellant is a publicly listed company quoted upon the Kuala Lumpur Stock Exchange. On 23 February 1991, the Panel on Take Overs and Mergers ('the Panel') made a ruling that certain shareholders in the appellant, including the first and second respondents were 'acting in concert' within the meaning of r. 2 of the Code on Take Overs and Mergers 1981 ('the Code'), and so were, by reason of r. 34 of the Code, under a legal obligation to extend a mandatory general offer to the shareholders of the appellant. This meant that none of the parties were free to transfer their shares unless either the offer document had been posted or the Panel consented to the transfer. On 10 April 1991, the Panel confirmed this ruling, and on 20 May 1991, confirmed that the parties were not released from their obligation to extend the general offer.

On 19 July 1991, the appellant received for registration, transfer forms for the transfer of 2,000 shares beneficially owned by the first respondent and registered in the name of the third respondent, though no mandatory offer had been extended to the shareholders.

By 6 August 1991, no general offer having been made, the concerted parties were publicly censured pursuant to the powers conferred upon the Panel under s. 179 (7A) of the Companies Act 1965 ('the Act'). However, the respondents were of the view that by reason of the public censure, the rulings were no longer effective, and/or that the censure, the rulings were no longer effective, and/or that the censure had the effect of erasing the rulings. No written exemption had been obtained from the Panel under r. 34.7 of the Code.

The appellant sought clarification of the legal position from the Panel. By a letter dated 5 September 1991 the Panel stated that neither the obligation nor the restriction under r. 34.7 was any longer applicable.

On 3 October 1991, the appellant received transfer forms for 250,000 shares registered in the name of the third respondent but beneficially owned by the second respondent.

The appellant was concerned that the consequence of r. 34.7 continuing to apply might be to render the transfers aforesaid ineffective in law to pass any title, and that the appellant would incur the risk of proceedings under s. 162(1) of the Act for rectification and for damages by any person or member aggrieved by the transfers. The appellant therefore decided not to proceed with the registration of the transfers until a ruling was obtained from the Court thereon. This decision was communicated to the Panel by a letter dated 1 October 1991.

On 11 October 1991, the appellant commenced proceedings by way of originating summons seeking a declaration as to whether it was under a legal duty to register the transfers, and whether rule 34.7 of the Code continued to apply notwithstanding the public censure aforesaid. More particularly, the originating summons prayed for declarations, that the plaintiff (appellant) was under a legal duty to refuse to register a transfer of the shares presented for registration, and that the decision of the Panel of 23 February 1991 and 20 May 1991 that r. 34 applied, continued to apply (prayer 3).

The High Court dismissed the appellant's application on the ground that it had no jurisdiction to hear it, by reason of the ouster clause contained in s. 179(8) of the Act, having regard to the Panel's letter dated 5 September 1991. The appellant appealed. After hearing full argument on the jurisdictional question only, the Supreme Court allowed the appeal on the ground that the High Court was not so barred, and directed that the application be heard on the merits by another judge. The originating summons was dismissed when it came up for rehearing. The appellant appealed.

Held:

Preliminary issues

[1] The High Court had jurisdiction.

The point about the ouster clause was no longer an issue before the High Court, and the judge ought not to have considered and made a decision on that issue. By allowing the appeal and directing the case to be re-heard, the Supreme Court had made a finding that the Panel's purported decision was made outside its jurisdiction and was null and void, and so was not caught by s. 179(8) of the Act. The purported decision was purely an opinion on the interpretation of s. 179(7A) of the Act itself, and not a ruling or decision in the exercise of its jurisdiction under r. 34.1 or 34.7 of the Code. Nor was it a consent under either of these rules.

In certain circumstances and provided always that the impugned act or decision of the Panel is not caught by the privative clause contained in s. 179(7A) of the Act, the Panel can be subject to judicial review since it performs a public function, the source of its power is statutory and it has a duty to act judicially. Though in England there are no statutory equivalent to subsections (4) to (9) of s. 179 of the Act, it does not mean that the English authorities relating to decisions of the Panel on Take Overs and Mergers should be looked at askance.

[2] The issues posed by the originating summons arose directly from real and substantial controversy between the parties, and were justiciable.

The case had a sufficiently concrete factual and legal underpinning, the parties had the necessary *locus standi* and the incentive to adequately present the pros and cons of the issues raised in it. More particularly, the appellant had sought the ruling of the Court on a definite, concrete and existing dispute which entailed the interpretation of the law with which the Court was qualified to deal and to intervene if the decision of the Panel thereon was *ultra vires* for want of jurisdiction. The concept of justiciability requires consideration of the subject matter of the question at issue, the manner of its presentation and the appropriateness of judicial adjudication in the light of these factors.

The Code is not a 'mere gentleman's guide,' not concerned with the enforcement of the law. The Code is a piece of delegated legislation and has the force of law. It is clear that there is in cases of statutory delegation a 'residual area' which is reserved for the courts. The Malayan Code cannot be equated with the London Code, which is a wholly voluntary and self-regulatory set of rules.

[3] The objection that the Panel had not been made a party to the proceedings was unsustainable.

The declarations sought concerned the rights and duties not of the Panel but of the parties in the action. Furthermore, the Panel had been given formal notice of the appellant's intention to commence and proceedings, by the letter dated 1 October 1991, yet it had remained passive. If a party does not complain, it is hardly the affair of others to complain.

In any case, even if the Panel had been made a party, it would have made no difference to the result of the appeal since the legal position of the point at issue was clear beyond a preadventure.

[4] The only appropriate remedy available to the appellant was a declaration. It was obvious

that *certiorari* might have the effect of quashing the Panel's decision, but the point would still remain, as to what the legal effect was of the public censure. Nor would the declaration result in two conflicting decisions, since the Panel's decision was null and void, having been made outside jurisdiction.

Furthermore, even the availability of a prerogative order will not be a sufficient ground for the dismissal of declaratory proceedings. The remedies are not necessarily mutually exclusive.

In any case, the judge himself had gone on to rule on the substantive issue as well. He had considered the merits on prayer 3 of the appellant's application, and had expressed his concurrence with the opinion of the Panel.

Substantive issue

The imposition by the Panel of the public censure pursuant to the powers conferred upon it by s. 179(7A) of the Act did not have the automatic effect of releasing the concert parties from the obligations and restriction imposed on them by rr. 34.1 and 34.7 of the Code. These obligations and restrictions continue in force unless and until the specific consent of the Panel is obtained by the concert parties under the above rules or until the concert parties comply with the direction to make a mandatory general offer.

The object of the concert parties provisions is the prevention of the take over of company control by stealth. In particular, r. 34 requires any person or group of persons acting in concert who acquires shares in a company carrying more than 33% of the voting rights to make a bid for all the other shares of the company at the highest price paid by the offeror for the shares in the previous 12 months. The purpose of r. 34.7 is to prevent the offeror from obtaining *de facto* control of the company's board before it had implemented the mandatory bid. The purpose is achieved by, first, proscribing transfers and secondly, by suspending the voting power.

If the imposition of a public censure had the legal effect contended by the respondents, the whole purpose of the Code could be frustrated and circumvented by deliberate non-compliance. Furthermore, it was illogical and unsatisfactory to draw the conclusion, as the Panel did, that a public censure could remove the very obligation the breach of which resulted in the imposition of the public censure in the first place.

Though s. 179 of the Act has been repealed by s. 45 of the Securities Commission Act 1993, since the proceedings in the Court below, with the result that the Panel did not exist, the effect of the saving provisions of s. 46 and s. 47(1) and (2) of the Securities Commission Act 1993 is that the Securities Commission steps into the shoes of the Panel.

Orbiter Dicta:

The term "justiciability" is not normally defined in English public law and it is not, of course, a concept of unchanging content. However, we would mention, only in passing, and without placing undue stress on the point, that according to **Black's Law Dictionary** (5th Ed., 1983) p. 1004, "the term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249 SC 561, 155 SE 2d 618, 621."

To take the point further the concept of justicability requires consideration of the subject matter of the question at issue, the manner of its presentation and the appropriateness of judicial adjudication in the light of these factors. Appropriateness in this context may be determined according to both institutional and constitutional standards which in turn require consideration of both the adequacy of judicial machinery for the task as well as the legitimacy of using it.

[Appeal allowed with costs. Judgment of the Court below set aside, and substituted with the three declarations prayed for].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG SYARIKAT: Pengambilan alih dan percantuman - Perayu sebuah syarikat awam yang disenaraikan dalam Bursa Saham KL - Obligasi dan sekatan - Saham-saham dipegang oleh pihak-pihak yang bersetuju bersama - Peraturan 34.1 & 34.7 Kanun Mengenai Pengambilan Alih dan Percantuman - Obligasi di bawah undang-undang untuk melanjutkan penawaran umum mandatori kepada pemegang-pemegang saham perayu - Tiada penawaran yang sedemikian dibuat -

Permohonan bagi memindah milik saham - Kelulusan panel tidak diperolehi - Teguran umum oleh panel - Seksyen 179(A) Akta Syarikat 1965 - Pernyataan oleh panel bahawa kedua-dua obligasi dan sekatan tidak lagi terpakai - Isu-isu awal - Sama ada Mahkamah mempunyai bidang kuasa - Klausa penyingkiran - Seksyen 179(8) Akta tersebut - Sama ada terpakai - Sama ada kontrovesi berjustifikasi - Sama ada panel sepatutnya dicantumkan sebagai suatu pihak - Sama ada prosiding perisytiharan wajar - Isu substantif - Sama ada pihak-pihak yang bersetuju bersama dilepaskan daripada obligasi dan sekatan keputusan panel.

AMALAN DAN PROSEDUR: Bidang kuasa - Klausa penyingkiran - Seksyen 179(8) Akta Syarikat 1965 - Pernyataan panel mengenai Pengambilan Alih dan Percantuman, bahawa pihak-pihak yang bersetuju bersama dilepaskan daripada obligasi dan sekatan mereka di bawah peraturn 34.1 dan 34.7 Kanun Pengambilan Alih dan Percantuman 1981 - Sama ada bidang kuasa Mahkamah Tinggi disingkirkan - Pernyataan - Sama ada keputusann atau pendapat semata-mata; kontrovesi di antara pihak-pihak tersebut - Sama ada berjustifikasi - Maksud - Sama ada kontrovesi itu benar-benar dan substansial - Kanun - Sama ada "panduan janji-mulut semata-mata" - Panel tidak bercantum sebagai suatu pihak kepada prosiding - Kesan; prosiding perisytiharan - Sama ada wajar.

Perayu ialah sebuah syarikat awam yang disenaraikan dalam Bursa Saham Kuala Lumpur. Pada 23 Februari 1991, Panel mengenai Pengambilan Alih dan Percantuman ("Panel") membuat suatu keputusan bahawa beberapa pemegang saham dalam perayu, termasuklah responden pertama dan kedua bertindak "secara bersetuju bersama" dalam lingkungan maksud peraturan 2 Kanun tersebut, atas sebab peraturn 34 Kanun tersebut, di bawah obligasi undang-undang untuk melanjutkan tawaran umum mandatori kepada pemegang-pemegang saham perayu. Ini bermakna bahawa tiada mana-mana pihak bebas untuk memindah milik saham-saham mereka melainkan sama ada dokumen tawaran telah diposkan atau panel bersetuju kepada pindah milik tersebut. Pada 10 April 1991, panel mengesahkan bahawa pihak-pihak tersebut tidak dilepaskan daripada obligasi mereka untuk melanjutkan tawaran umum tersebut.

Pada 19 Julai 1991, perayu menerima untuk pendaftaran, borang-borang pindah milik bagi pindah milik 2,000 saham yang secara benefisialnya dimiliki oleh responden pertama dan didaftarkan dalam nama responden ketiga, walaupun tiada tawaran mandatori dilanjutkan kepada pemegang-pemegang saham.

Menjelang 6 Ogos 1991, memandangkan tiada tawaran umum dibuat, pihak-pihak yang bersetuju bersama telah ditegur secara umum menurut kuasa yang diberikan oleh panel di bawah s. 179 (7A) Akta Syarikat 1965 ("Akta tersebut"). Walau bagaimanapun, responden-responden berpendapat bahawa disebabkan teguran umum tersebut, keputusan berkenaan tidak lagi berkesan, dan/atau bahawa teguran tersebut mempunyai kesan menyingkirkan keputusan berkenaan. Tiada pengecualian bertulis diperolehi daripada panel di bawah peraturan 34.7 Kanun tersebut.

Perayu telah meminta penjelasan mengenai kedudukan undang-undang daripada panel. Melalui sepucuk surat bertarikh 5 September 1991, panel tersebut telah menyebutkan bahawa kedua-dua obligasi dan sekatan di bawah peraturan 34.7 tidak lagi terpakai.

Pada 3 October 1991, perayu telah menerima borang pindah milik bagi pindah milik 250,000 saham yang didaftarkan dalam nama responden ketiga tetapi secara benefisialnya dimiliki oleh responden kedua.

Perayu merasa bimbang bahawa akibat keterusan pemakaian peraturan 34.7 mungkin akan menyebabkan pindah milik yang tersebut di atas menjadi tidak berkesan dari segi undang-undang untuk meluluskan mana-mana hakmilik, dan bahawa perayu akan menanggung risiko prosiding di bawah s. 162(1) Akta tersebut bagi pembetulan dan bagi ganti rugi oleh mana-mana orang atau ahli yang terkilan dengan pindah milik tersebut. Oleh yang demikian perayu telah memutuskan untuk tidak meneruskan dengan pendaftaran pindah milik tersebut sehingga suatu keputusan diperolehi dari Mahkamah mengenainya. Keputusan ini telah disampaikan kepada panel melalui sepucuk surat bertarikh 1 Oktober 1991.

Pada 11 Oktober 1991, perayu telah memulakan prosiding melalui saman pemula memohon perisytiharan sama ada ia berkewajipan di bawah undang-undang bagi mendaftarkan pindah milik tersebut, dan sama ada peraturn 34.7 Kanun tersebut terus terpakai meskipun adanya teguran umum seperti yang tersebut di

atas. Terutama sekali, saman pemula tersebut memohon untuk perisytiharan bahawa plaintif (perayu) berkewajipan di bawah undang-undang untuk menolak daripada mendaftarkan pindah milik saham-saham yang dikemukakan untuk pendaftaran, dan bahawa keputusan panel pada 23 Februari 1991 dan 20 Mei 1991 bahawa peraturn 34 terpakai, terus kekal (pohonan 3).

Mahakamah Tinggi telah menolak permohonan perayu atas alasan bahawa ia tidak mempunyai bidang kuasa untuk mendengarnya, atas sebab klausa penyingkiran yang termaktub dalam s. 179(8) Akta tersebut, berhubung dengan surat panel yang bertarikh 5 September 1991. Perayu kemudiannya membuat rayuan. Selepas mendengar penghujahan penuh mengeni persoalan bidang kuasa sahaja, Mahkamah Agung telah membenarkan rayuan tersebut atas alasan bahawa Mahkamah Tinggi tidaklah dihalang sebegitu, dan mengarahkan supaya permohonan tersebut didengar atas merit oleh Hakim lain. Saman pemula tersebut telah ditolak apabila ia dipanggil untuk pendengaran. Perayu kemudiannya membuat rayuan.

Diputuskan:

Isu-isu Awal

[1] Mahkamah Tinggi mempunyai bidang kuasa.

Fakta mengenai klausa penyingkiran tidak lagi merupakan suatu isu di hadapan Mahkamah, dan Hakim berkenaan seharusnya tidak mempertimbangkan dan membuat keputusan ke atas isu tersebut. Dengan membenarkan rayuan tersebut dan mengarahkan kes berkenaan didengar semula, Mahkamah Agung telah membuat suatu keputusan bahawa keputusan panel yang dikatakan itu telah dibuat di luar bidang kuasanya dan adalah terbatal dan tidak sah, dan oleh itu tidak lagi tergolong dalam s. 179(8) Akta tersebut. Keputusan yang dikatakan itu hanya merupakan pendapat semata-mata atas pentafsiran s. 179(7A) Akta tersebut itu sendiri, dan bukan suatu keputusan dalam mengamalkan bidang kuasanya di bawah peraturn 34.1 atau 34.7 Kanun tersebut. Dan ia juga tidak merupakan suatu persetujuan di bawah mana-mana peraturan.

Dalam keadaan-keadaan yang tertentu dan dengan syarat bahawa tindakan atau keputusan panel yang dipersoalkan tidak tergolong dalam klausa sulit yang terkandung dalam s. 179(7A) Akta tersebut, Panel boleh tertakluk kepada semakan kehakiman memandangkan ia menjalankan fungsi umum, sumber kuasanya ialah statutori dan ia mempunyai kewajipan untuk bertindak dari segi kehakiman. Walaupun di England tiada statutori yang sama dengan subseksyen (4) hingga (9) s. 179 Akta tersebut, ini tidaklah bermakna bahawa autoriti Inggeris berhubung dengan keputusan Panel ke atas Pengambilan Alih dan Percantuman patut diragui.

[2] Isu-isu dalam saman pemula berbangkit terus daripada kontrovesi yang sebenar dan substansial di antara pihak-pihak berkenaan, dan adalah berjustifikasi.

Kes tersebut mempunyai fakta yang konkrit dan penekanan undang-undang, pihak-pihak tersebut mempunyai *locus standi* yang sepatutnya dan insentif bagi menyampaikan dengan penuhnya akan kebaikan dan keburukkan isu-isu yang dibangkitkan di dalamnya itu. Terutama sekali, perayu telah memohon perintah Mahkamah ke atas suatu pertikaian semasa yang definit, konkrit yang melibatkan pentafsiran undang-undang di mana Mahkamah adalah layak untuk berurusan dengannya dan campur tangan jika keputusan panel ke atasnya adalah *ultra vires* kerana kekurangan bidang kuasa. Konsep justifikasi menghendaki pertimbangan hal-perkara mengenai persoalan yang dipertikaikan, cara presentasinya dan kewajaran adjudikasi kehakiman melihatkan kepada faktor-faktor ini.

Kanun tersebut bukanlah suatu "panduan janji-mulut semata-mata", tidak berkenaan dengan penguatkuasaan undang-undang. Kanun tersebut ialah sebuah perundangan yang diwakilkan dan mempunyai kuasa undang-undang. Adalah jelas bahawa terdapat dalam kes-kes perwakilan statutori suatu "kawasan baki" yang dirizabkan untuk Mahkamah. Kanun Malaya tidak boleh disamakan dengan Kanun London, yang mana merupakan suatu set peraturan yang sukarela dan terurus dengan sendirinya.

[3] Bantahan bahawa panel tersebut tidak dijadikan sebuah pihak kepada prosiding berkenaan adalah tidak boleh dikekalkan.

Perisytiharan yang dipohon bukanlah berkenaan dengan hak dan kewajipan panel tersebut, tetapi pihak-pihak dalam tindakan tersebut. Tambahan lagi, notis rasmi telah

diberikan kepada panel mengenai niat perayu untuk memulakan prosiding melalui surat bertarikh 1 Oktober 1991. Walau pun begitu panel tetap kekal pasif. Jika sesuatu pihak tidak membuat aduan, ia tidaklah menjadi hal ehwal pihak lain untuk membuat aduan. Walau apa pun jua, jika panel telah dijadikan sebuah pihak, keputusan rayuan tersebut tetap tidak akan berubah memandangkan kedudukan undang-undang fakta yang dipersoalkan itu adalah jelas di luar pra cabaran.

[4] Satu-satunya remedi yang wajar bagi perayu ialah perisytiharan. Adalah jelas bahawa *certiorari* mungkin mempunyai kesan membatalkan keputusan panel, tetapi faktanya tetap akan kekal, mengenai apakah kesan undang-undang akan teguran umum. Begitu juga perisytiharan tersebut tidak akan membawa kepada dua keputusan yang bertentangan, memandangkan keputusan panel adalah terbatal dan tidak sah, kerana dibuat di luar bidang kuasa.

Tambahan lagi, kesediaan perintah istimewa tidak akan menjadi alasan yang cukup untuk menyingkirkan prosiding perisytiharan. Remedinya tidak semestinya eksklusif secara bersama.

Walau apa pun jua, Hakim tersebut sendiri juga telah memutuskan atas isu substansif. Beliau telah mempertimbangkan merit atas pohonan 3 akan permohonan perayu, dan telah menyuarakan persetujuannya dengan pendapat panel.

Isu substansif

Pengenaan teguran umum oleh panel menurut kuasa yang diberikan kepadanya oleh s. 179(7A) Akta tersebut tidak mempunyai kesan automatik untuk melepaskan pihak-pihak yang bersetuju bersama daripada obligasi dan sekatan-sekatan yang dikenakan ke atas mereka oleh peraturan 34.1 dan 34.7 Kanun tersebut. Obligasi dan sekatan-sekatan ini masih terus berkuatkuasa melainkan dan sehingga persetujuan spesifik panel diperolehi oleh pihak-pihak yang bersetuju bersama di bawah peraturan-peraturan yang tersebut di atas atau sehingga pihak-pihak yang bersetuju bersama mematuhi arahan untuk membuat suatu tawaran mandatori.

Matlamat peruntukan pihak-pihak yang bersetuju bersama adalah untuk menghalang pengambilan alih pengawalan syarikat secara senyap-senyap. Terutama sekali, peraturan 34 menghendaki sesiapa atau mana-mana kumpulan orang yang bertindak secara bersetuju bersama yang memperolehi saham dalam sesebuah syarikat yang membawa lebih daripada 33% hak mengundi untuk membuat tawaran beli bagi kesemua saham lain syarikat tersebut pada harga yang tertinggi dibayar oleh penawar untuk saham-saham tersebut dalam 12 bulan sebelumnya. Tujuan peraturan s. 34.7 ialah untuk menghalang penawar daripada memperolehi pengawalan *de facto* akan lembaga syarikat sebelum ia melaksanakan tawaran mandatori tersebut. Tujuan berkenaan dicapai melalui, pertamanya, menghalang pindah milik dan keduanya, dengan menggantung kuasa pengundi.

Jika pengenaan teguran umum mempunyai kesan undang-undang yang dihujahkan oleh para responden, keseluruhan tujuan Kanun tersebut akan dikecewakan dan dielakkan oleh ketidakpatuhan yang sengaja. Tambahan lagi, adalah tidak logik dan tidak puashati untuk mencapai keputusan tersebut, sebagaimana yang dilakukan oleh panel tersebut, bahawa teguran umum dapat mengalihkan obligasi pelanggaran mana mengakibatkan dalam pengenaan teguran umum.

Walau pun s. 179 Akta tersebut telah dimansuhkan oleh s. 45 Akta Suruhanjaya Sekuriti 1993, memandangkan prosiding dalam Mahkamah di bawah ini, dengan keputusan bahawa panel tidak wujud, kesan peruntukan penyelamat akan s. 46 dan s. 47(1) dan (2) Akta Suruhanjaya Sekuriti ialah bahawa Suruhanjaya Sekuriti mengambil alih tempat panel.

Orbiter Dicta:

Terma "justiciability" tidak selalunya ditakrifkan dalam undang-undang awam Inggeris dan ianya tidak merupakan suatu konsep penghujahan yang tidak berubah. Walau bagaimanapun, kami akan menyebutkan, hanya sepintas lalu, dan tanpa meletakkan apa-apa tekanan yang tidak seharusnya pada fakta berkenaan, bahawa menurut **Black's Law Dictionary** (Edisi ke-5, 1983) m.s. 1004, "the term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.,* 249 SC 561, 155 SE 2d 618, 621."

Sebagai melanjutkan fakta tersebut, konsep justicability menghendaki pertimbangan hal-perkara persoalan yang dipertikaikan, cara presentasinya dan kewajaran adjudikasi kehakiman dalam melihat faktor-faktor ini. Kewajaran dalam konteks ini boleh diputuskan menurut kedua-dua standard keinstitusian dan perlembagaan yang mana akan menghendaki pertimbangan akan kedua-dua keupayaan jentera kehakiman dan juga keesaan penggunaannya.

[Rayuan dibenarkan dengan kos. Penghakiman Mahkamah di bawah diketepikan, dan digantikan dengan tiga perisytiharan yang dipohon].

[Editorial Note: The decision of the High Court was reported in the March Part 2 issue of CLJ. See [1994] 1 CLJ 527]

Cases referred to:
Re Fry [1946] 1 Ch 312 ***(cit)***
Re Rose [1949] 1 Ch 78 ***(cit)***
Re the Bahia and San Francisco Railway Co. Ltd. [1968] LR 3 QB 584 ***(cit)***
Hedley Byrne & Co. Ltd. v. Heller & Partners [1964] AC 465 ***(cit)***
Neogh Soo Oh v. Rethinasamy [1984] 1 MLJ 126 ***(cit)***
Re Ottos Kopje Diamond Mines Ltd. [1983] 1 Ch. 618 ***(cit)***
Moore v. North Western Bank [1991] 2 Ch 599 ***(cit)***
Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147 ***(foll)***
Re Lee Phee Soo [1960] MLJ 75 ***(cit)***
South East Asia Fire Bricks v. Non-Metalic Mineral Products Manufacturing Employees Union [1981] AC 363 ***(foll)***
Pearlman v. Harrow School [1979] QB 56 ***(cit)***
R v. Panel on Take-overs and Mergers, ex parte Datafin [1987] QB 815 ***(cit)***
R v. Take-over Panel, ex parte Guiness Plc [1990] 1 QB 146 ***(cit)***
Ganda Oil Industries Sdn. Bhd. v. Kuala Lumpur Commodity Exchange & Anor. [1988] 1 MLJ 174 ***(cit)***
Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co., 249 SC 561, 155 SE 2d 618, 621 ***(cit)***
Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(cit)***
Thorne v. University of London [1966] 2 QB 237 ***(cit)***
Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd. [1921] 2 AC 438 ***(cit)***
Majumder v. A.G. Sarawak [1967] 1 MLJ 101 ***(dist)***
Eshah bte Sa'at [1975] 1 MLJ 97 ***(cit)***
Sungei Wangi Estate v. Uni [1975] 2 MLJ 136 ***(dist)***
Malloch v. Aberdeen Corporation [1971] 1 WLR 1578 ***(cit)***
Cheall v. APEX [1983] 2 AC 180 ***(cit)***
Acs v. Anderson [1975] 1 NSWLR 212 ***(cit)***
Brickfield Properties v. Newton [1971] 3 AER 328 ***(cit)***
Pyx Granite Co. v. Ministry of Housing and Local Government [1960] AC 260 ***(cit)***

Legislation referred to:
Companies Act 1965, ss. 107(1), 158(1), 162(1), 179 (4) to (9)
Exchange Control Act 1953, s. 12
Code on Take Overs and Mergers 1981, rr. 2, 34, 34.1 and 34.7
Industrial Relations Act 1967, s. 29(3)
Securities Commission Act 1993, s. 45, 46 & 47(1) and (2)
Finance Regulations 1946 (Singapore)
Code on Take-overs and Mergers (UK)
Exchange Control Act 1948 (UK)
Rules of the Supreme Court 1980, O. 15 r. 16 (UK)

Other sources referred to:
Black's Law Dictionary, 5th Edn., 1983, p. 1004
Declaratory Judgments, Professor E. Borchard, 2nd Edn., p. 49
Discipline of the Law (1979), Lord Denning, Chap. 2

For the appellant - W.S.W Davidson (H.Y. Chong with him); M/s. Azman, Davidson & Co.
For the 1st and 2nd respondents - M.S. Murthi; M/s. Murthi & Partners
For the third respondent - Ong Chin Beng; M/s. Ong Chin Beng & Rakan-Rakan

JUDGMENT

Edgar Joseph Jr. SCJ:
The dominant question of Law which arises for decision in this appeal may be stated thuswise:

> Does the imposition of a public censure by the panel on Take Overs and Mergers ("the Panel") under s. 179(7A) of the Companies Act 1965, ("the Act") have the automatic effect in Law of releasing the concert parties of their obligations and restrictions under rr. 34.1 and 34.7 of the Code on Take Overs and Mergers 1981, ("the Code") as the respondents (the defendants in the court below) and the panel contend or whether the obligations and restrictions continue notwithstanding the public censure until the general offer is made or the panel releases the parties in concert from their obligations, as the appellant (the plaintiff in the court below) contends?

To put the matter in perspective, the provisions of the Act and the Code, respectively, which it would be convenient to reproduce are these:

Section 179 of the Act

(1) ...
(2) The Minister may, by order, appoint a panel on Take-Overs and Mergers (here-

inafter referred to as "the Panel") consisting of such persons as he thinks fit to administer, supervise and control take-overs and mergers.

(3)(a) The panel may prepare a code containing general principles and rules to be complied with by all parties concerned in a take-over and merger transaction (hereinafter referred to as "the Code") and may from time to time amend the Code in any manner it deems fit.

(b) ...

(4) The panel shall administer the Code and may do anything necessary for the proper exercise of its functions, including but not restricted to the following:

(a) issue rulings, from time to time, on the interpretation of the general principles and rules;

(b) ...
(c) ...
(d) ...
(e) ...

(5) (a) ...
(b) ...
(c) ...

(6) ...

(7) Subject to subsection (5), a failure by any party concerned in a take-over or merger transaction to observe any of the general principles and rules in the Code shall not of itself render that party liable to criminal proceedings but any such failure may, in any proceedings, whether civil or criminal, be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in the proceedings.

(7A) Notwithstanding subsection (7), where any party concerned in a take-over or merger transaction fails to observe any of the general principles and rules in the Code, the panel may, after giving the party an opportunity to be heard, invoke such sanction as private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange as it deems fit.

(8) The acts and decisions of the panel in the exercise of its functions in respect of the general principles and rules in the code shall be final and not capable of being challenged in any court.

(9) Neither the panel nor any member of the panel or its secretariat shall be liable to any legal proceedings in respect of anything done or omitted to be done by it or him in the exercise of its or his functions, duties and powers under this section or the general principles and rules in the Code.

Rules 2, 34.1 and 34.7 of the Code:

2. Definitions

"Acting in concert". Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control of that company.

34. Mandatory Offer

34.1 Except with the consent of the panel, or unless otherwise directed by the panel where:

(a) any person acquires, whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry more than 33% of the voting rights of a company; or

(b) any person who, together with persons acting in concert with him, holds not less than 33% but not more than 50% of the voting rights and such person, or any person acting in concert with him, acquires in any period of 12 months additional shares carrying more than 2% of the voting rights;

such person shall extend within a reasonable period of time an offer on the basis set out below to the holders of any class of share capital which carries votes and in which such person or persons acting in concert hold shares. In addition to such person, each of the principal members of the group of persons acting in concert may, according to the circumstances of the case, have the obligation to extend an offer.

34.7 Except with the consent of the panel, no nominee of the offeror or persons acting in concert with it shall be appointed to the board of the offeree company, nor shall the offeror and persons acting in concert with it transfer, or exercise the votes attaching to, any shares held in the offeree company, until the offer document has been posted.

So far as material for purposes of this appeal, the facts regarding which there is no dispute may be briefly stated.

The appellant is a publicly listed company quoted on the Kuala Lumpur Stock Exchange.

The panel had, on 23 February 1991, made a ruling that certain shareholders in the appellant ("the Concert Parties") including the first and the second respondents (whose shares were registered in the name of the third respondent) were "acting in concert" within the meaning of r. 2 of the Code, and so were, by reason of r. 34 of the Code, under a legal obligation to extend a mandatory general offer to the shareholders of the appellant. This, of course, meant that none of the concert parties were free to transfer their shares unless either the offer document had been posted or the panel consented to the transfer.

On 10 April 1991, the panel had by letter directed that, while the question of whether a general offer was required to be made was under further consideration, the concert parties comply, with r. 34.7 of the Code.

On 20 May 1991, the panel had confirmed its earlier ruling dated 23 February 1991, that the concert parties were not released from their obligation to extend the general offer.

But then, on 19 July 1991, the appellant had received for registration, transfer forms for the transfer of 2,000 shares beneficially owned by the first respondent and registered in the name of the third respondent. This was at a time when no mandatory general offer under r. 34 of the Code had been extended to the shareholders of the appellant. So the appellant wrote to the third respondent on 25 July 1991, drawing their attention to r. 34.7 of the Code and enquiring whether approval of the panel had been obtained for the transfer.

By 6 August 1991, no general offer having been made, the concert parties were publicly censured pursuant to the powers conferred upon the panel under s. 179(7A) of the Act.

However, the respondents were of the view that by reason of the public censure the restriction on the transfer of shares held by the concert parties was no longer effective and/or the invocation of the power of public censure had the effect of erasing the earlier rulings of the panel. Furthermore, the first respondent confirmed that no written exemption had been obtained from the panel under r. 34.7 of the Code.

In these circumstances, the appellant considered it desirable to seek clarification of the legal position from the Panel, which it did by letter dated 21 August 1991. The panel responded by letter on 5 September 1991, stating that a public censure having been imposed by it in the exercise of its powers under s. 179(7A) of the Act, neither the obligation nor the restriction under r. 34.7 was any longer applicable.

On 3 October 1991, the appellant had received for registration, transfer forms for 250,000 shares registered in the name of the third respondent but beneficially owned by the second respondent. This evoked a reply by letter from the appellant to the third respondent, on 8 October 1991, stating that it took an opposite view to that taken by the panel; namely, that both the obligation and the restriction impose under r. 34.7 of the Code continued to apply notwithstanding the public censure and that it would accordingly seek a declaratory order from the Court as to what the true legal position was.

Having regard to the events outlined above, the appellant's board of directors were concerned that the consequences of r. 34.7 continuing to apply notwithstanding the public censure might be to render the transfers aforesaid ineffective in law to pass any title and, if so, to render inapplicable the ordinary rule that registration of a transfer is *prima facie* evidence of title.

It is interesting to note that a provision equivalent to r. 34.7, is s. 12 of the Exchange Control Act 1953, which, broadly stated, provides that certain securities may not be transferred without the permission of the Controller of Foreign Exchange. Both in England and in Singapore, there were provisions equivalent to our s. 12 namely, the former U.K. Exchange Control Act 1948, and the Singapore Finance Regulations 1946, respectively, which have been judicially considered.

So far as England is concerned, we note that in *Re Fry* [1946] 1 Ch 312, the English High Court had refused to recognise the efficacy of a voluntary transfer of shares made without the consent of the Treasury. Three years later, the effect of the decision in *Re Fry* was recognised in *Re Rose* [1949] 1 Ch 78 at 89, as being, that until a necessary permission has been obtained a purported transfer is ineffective to pass any title or interest.

So far as Singapore is concerned, a similar view was taken by the Court of Appeal there in *Re Lee Phee Soo* [1960] MLJ 75.

But, to take the problem about title further, the dilemma confronting the appellant, which incidentally was by s. 107(1) of the Act required to issue a share certificate within one month of the lodging with it of a transfer, is well illustrated by the case of *Re the Bahia and San Francisco Railway Co. Ltd.* [1968] LR 3 QB 584. In that case, the transferors had in fact no shares and it was held that the company ought not to have registered them as shareholders or given them a share certificate, the transfer to them being a forgery. The problem which faced the company was that by issuing the share certificate, it had made a representation with the intention that it was to be acted upon by another. In the result, it was held that the company was estopped from denying the truth of what was represented to be a fact. In consequence, the company was ordered to pay damages to a further transferee for loss of the shares.

The developments in this area of the law following *Hedley Byrne & Co. Ltd. v. Heller & Partners* [1964] AC 465 (applied in *Neogh Soo Oh v. Rethinasamy* [1984] 1 MLJ 126) have been such that a company may well incur liability in tort for such representation if made negligently. (See *Re Ottos Kopje Diamond Mines Ltd.* [1983] 1 Ch. 618 at p 625 per Lindley LJ).

Clearly, if the name of any person is without sufficient cause entered in the register of Members which a company is obliged to keep under s. 158(1) of the Act, then the company incurs the risk of proceedings being brought against it under s. 162(1) of the Act for rectification of the register and for damage suffered, in consequence, by a person aggrieved or any member of the company.

In these circumstances, having regard to the fact that the point at issue was novel and not entirely free from doubt or difficulty, the appellant decided, -and we would interpolate, prudently decided - not to proceed with the registration of the transfers sent to them for registration until a ruling had been obtained from the Court thereon. (See e.g. *Moore v. North Western Bank* [1991] 2 Ch 599 at 604).

This decision was duly communicated by the appellant's solicitors by their letter dated 1 October 1991 (Ex. P13 annexed to the affidavit of its chairman Tan Sri Ibrahim bin Ismail) addressed to the panel.

Accordingly, on 11 October 1991, the appellant commenced proceedings by way of originating summons seeking a declaration as to whether it was under a legal duty to register the transfers referred to above, and whether r. 34.7 of the Code continued to apply notwithstanding the public censure aforesaid. More particularly, the originating summons prayed for the following declarations:

(a) that the plaintiff is under a legal duty to refuse to register a transfer of two thousand shares, owned by the first defendant, from the third defendant to Ng Seng Yuen under a transfer dated 12 July 1991 and presented to the plaintiff on 19 July 1991;

(b) that the plaintiff is under a legal duty to refuse to register a transfer of two hundred and fifty thousand shares, owned by the second defendant, from the third defendant to Mayban Nominee (Singapore) Pte. Ltd. under transfers dated 30 September 1991 and presented to the plaintiff on 3 October 1991;

(c) that the decision of the Malaysian Panel on Take-Overs and Mergers on 23 February 1991 and 20 May 1991, that r. 34 of the Malaysian Code on Take-overs and Mergers (hereinafter "the Code") applied to the issued share capital of the plaintiff, continues to apply.

The appellant's application came on for hearing on 27 March 1991, in the High Court (Commercial Division), Kuala Lumpur, and during the course of that hearing objection was taken by the respondents that the Court was debarred from entertaining the appellant's claim by reason of the provisions of s. 179(8) of the Act (reproduced above) having regard to the second paragraph of the panel's letter dated 5 September 1991 (Ex P 10) which contained the decision of the panel as to the legal effect of the imposition of the public censure on the obligations and restrictions under rr. 34.1 and 34.7 of the Code.

The objection commended itself to his Lordship who then dismissed the appellant's application on the ground that the High Court had no jurisdiction to hear the same.

The appellant being dissatisfied with that decision appealed against the same to the Supreme Court (Civil Appeal No. 02-183-92) and on 3 September 1992, after hearing full argument on the jurisdictional question only, the Supreme Court, which comprised Harun Hashim, Edgar Joseph Jr. and Eusoff Chin SCJJ, allowed that

appeal on the ground that the High Court was not precluded by s. 179(8) of the Act from hearing the appellant's application and directed that the application be heard on the merits by another Judge.

At this point, we would pause to observe, that although the Supreme Court in allowing that appeal did not give a written judgment, it is clear beyond peradventure that by its decision allowing the appeal and directing that the application by way of originating summons be remitted to the High Court to be re-heard on the merits before another Judge, the Supreme Court had made a finding that the panel's purported decision - which was nothing less than an opinion on the legal consequences of a public censure - was made outside its jurisdiction and was therefore not caught by s. 179(8) of the Act which only ousts the Court's jurisdiction in respect of the panel's decision made within its jurisdiction.

Ordinarily we would have made merely a passing reference to the proceedings in the earlier appeal to the Supreme Court by way of background only, but because one of the grounds relied upon by the Judge in dismissing the originating summons when it came up for re-hearing on the merits, was that he had no jurisdiction to hear the originating summons by reason of the ouster clause contained in s. 179(8) of the Act, we find it necessary to dilate a little on the legal effect of ouster clauses.

It is right to say at the risk of being trite that most ouster clauses - common example particular decision "shall be final" (finality clauses), "shall have effect as if enacted in this Act" (as if enacted clauses), "shall not be questioned" (shall not be questioned clauses) and "shall not be subject to *certiorari*, prohibition, mandamus, injunction in any Court on any account" (no certiorari clause) - are now, in England, in disuse and have been disapproved. (See Lord Denning, **Discipline of the Law (1979),** Chap. 2 for an entertaining and historical account of the subject, illustrated by the cases). We would, however, stress that in relation to each type of clause it has been held that judicial review is available in respect of jurisdictional error.

In the landmark case of *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, the House of Lords struck down an ouster clause of the "shall not be questioned" variety. At p. 208, Lord Wilberforce made the telling observation "What would be the purpose of defining by statute the limit of a tribunal's powers, if by means of a clause inserted in the instrument of definition, those limits could be safely bypassed?"

In the Malaysian Privy Council case of *South East Asia Fire Bricks v. Non-Metalic Mineral Products Manufacturing Employees Union* [1981] AC 363, the Privy Council was concerned with s. 29(3) of the Industrial Relations Act 1967, which provided:

> ... an award of the [Industrial] Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called in question in any Court of law.

So, in this case, as in *Anisminic*, the Court was concerned with a "no *certiorari* clause". The Judicial Committee having cited Anisminic said (p 370 D-E):

> But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective.

The Judicial Committee upheld the dissenting judgment of Geoffrey Lane LJ (as he then was) whilst repudiating Lord Denning's suggestion in *Pearlman v. Harrow School* [1979] QB 56, that the distinction between errors of law within and without jurisdiction should be discarded.

The authorities we have cited on ouster clauses provide ample justification for the decision of the Supreme Court in the earlier appeal. We must next direct our attention to the grounds of decision of the learned Judge.

In the first place, the Judge had re-considered the issue of the panel's jurisdiction to render its purported decision aforesaid and concluded, contrary to the clear implication of the decision of the Supreme Court in the earlier appeal being Civil Appeal No. 02-183-92, that in so doing it could not be said that the Panel had made a jurisdictional error. This is how he put it:

> ... It cannot be said that in doing so (rendering its purported decision), the panel has made a jurisdictional error, as the law is clear that the panel has the sole power to administer the code for all take-over and merger transactions, ...

And, in another passage, a little further down, the Judge said this:

> In the final analysis, my view was that the panel, in stating that the public censure meant that the parties acting in concert need not comply with r. 34.7 of the Code, was not merely expressing a mere opinion on the effect of the public censure but was actually making a ruling and a decision, which it had the power to make under s. 179(4)(a) and s. 179(7A) respectively of the Act, the latter incidentally having been added in on 1 February 1987 to overcome a situation like this, and my finding is that this is quite in order and in line with the Code and the Act. (Ed. Note: See [1994] 1 CLJ @ 533)

If the Judge was correct in directing himself as aforesaid, then the inevitable conclusion would be that the ouster clause contained in s. 179(8) of the Act would have been effective to exclude the jurisdiction of the Court to entertain the appellant's application.

But, with all due respect to the Judge, he ought not, and indeed could not, have re-opened the issue of the panel's jurisdiction to render a purported decision on the legal effect of the imposition of a public censure under s. 179(7A) of the Act, regard being had to the clear implication of the decision of the Supreme Court in the earlier appeal, to which we have referred. In other words, the point about ouster of jurisdiction of the High Court was no longer an issue before the High Court and so the Judge ought not to have considered and made a decision on that issue.

Since no written judgment was delivered by the Supreme Court in that appeal, we would, for the avoidance of doubt, say that it is patently obvious that the purported decision of the panel amounted purely to rendering an opinion on the interpretation of s. 179(7A) of the Act itself since it was in substance an opinion as to the legal effect of the imposition of the public censure under the provisions of s. 179(7A) of the Act and not a ruling or a decision in the exercise of its jurisdiction under r. 34.1 or r. 34.7 of the code.

We need hardly add, since it goes without saying, that there is a clear difference between, on the one hand, the giving of consent under r. 34.1 or r. 34.7 of the Code and on the other hand, the giving of an opinion on the legal consequences of a public censure. The panel's decision was not a consent under r. 34.1 or r. 34.7.

It follows, therefore, that the panel's purported decision was not, and could not be a ruling or a decision on the interpretation of the general principles or rules of the Code which it was undoubtedly empowered to make under s. 179(4)(a) of the Act. Indeed, nowhere in the relevant correspondence did the panel even attempt to construe the general principals or any of the rules of the Code. Thus, the purported decision of the panel was made outside its jurisdiction with the result that that decision was null and void and, so, not caught by the privative clause contained in s. 179(8) of the Act.

It is true, as the Judge pointed out, that in England, there are no statutory provisions equivalent to sub-sections (4) to (9) of s. 179 of the Act, but with respect, that does not mean that the English authorities relating to decisions of the panel on Take-overs and Mergers should be looked at askance, for reasons we shall now give.

The City Code on Take-overs and Mergers in England ("the London Code"), unlike the Malaysian Code on Take-overs and Mergers, was not promulgated by Parliament. The English panel is a typical self-regulating body of the kind dear to the heart of the business community. It has neither statutory, prerogative nor Common Law powers nor is it in contractual relationship with the commercial community who are expected to obey that code.

Nevertheless, the extent and reach of the judicial arm was emphatically illustrated in *R. v. panel on Take-overs and Mergers, ex parte Datafin* [1987] QB 815. The complaint there was that the City's Take-over panel had misdirected itself in its policing of a take over bid for the McCorquodale printing group. More particularly, the applicants who were bidding in competition with N. Plc. to take over another company, complained to the panel of Take-overs and Mergers that N. Plc. had acted in concert with other parties in breach of the London Code.

The panel dismissed the complaint and in consequence the applicants applied to the High Court for leave to commence judicial review proceedings. On the same day as the application was made it was considered by the single Judge who refused leave on the ground that the panel's decision was not subject to judicial review. The application was then re-newed in the Court of Appeal, which granted leave, and went on itself

to hear the substantive application and the question of jurisdiction, announced its decision straightaway but gave its reasons a few days later.

The Court of Appeal held that the self-regulatory panel was deemed to be engaged in a public law activity in its regulation of the financial markets, that it would be unthinkable to allow it to be "cocooned" from the attention of the Courts and so the court had jurisdiction to review the panel's decision to dismiss the applicants' complaint. But, on the facts, the Court rejected the complaint that the panel had misdirected itself with the result that there were no grounds for interfering with the panel's decision.

An important reason for the Court concluding that it had jurisdiction was because the panel was performing a public function. As Lloyd LJ said at p. 847:

> I do not agree that the source of power is the sole test of a body subject to judicial review... of course the source of power will perhaps usually be decisive. If a source of power is statute or subordinate legislation under statute then clearly the body in question will be subject to judicial review. If, on the other end of the scale the source of power is contractual as in the case of private arbitration then clearly the arbitrator is not subject to judicial review... but in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power.

However, in the same case, Donaldson MR acknowledged the necessity for speed and certainty in the context of current take-overs, and seemed to imply that the Court would be reluctant to interfere with the panel's decisions. This is how the Master of the Rolls put it (at p. 842):

> I wish to make it clear beyond peradventure that in the light of the special nature of the panel and its functions and the market in which it is operating the timescales which are inherent in that market and the need to safeguard the position of third parties who may be numbered in thousands all of whom are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions unless and until they are quashed by the Court, I should expect the relationship between the panel and the Court to be historic rather than contemporaneous. I should expect the Court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in restrospect by declaratory orders which would enable the panel not to repeat any error and will relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules.

In the subsequent case of *R. v. Take-over Panel, ex parte Guinness plc* [1990] 1 QB 146, the refusal by the panel to grant the Guinness company an adjournment of an oral hearing was ultimately found not to be an infringement of a rule in the panel's procedure. The Court held, though with some hesitation, that since the panel had weighed up all the factors for and against the grant of an adjournment, there had been no procedural irregularity.

It is worth noting that in *Ex parte Guinness (ibid)* Donaldson MR referred to the passage in his judgment in Datafin (reproduced above), which he thought had been misunderstood in certain quarters and sought to explain it. This is what he said at pp. 158/159:

> This passage has, I think, been misunderstood, at least by academic writers. When the take-over is in progress the time scales involved are so short and the need of the markets and those dealing in them to be able to rely on-the rulings of the panel so great, that contemporary intervention by the Court will usually either be impossible or contrary to the public interest. Furthermore, it is important that this should be known, as otherwise attempts would undoubtedly be made to undermine the authority of the panel by tactical applications for judicial review. On the other hand, once the immediate problem has been dealt with by the panel, no similar objections would apply to a retrospective review of its actions designed to avoid the repetition of error, if error there has been. And when it comes to disciplinary action by the panel, which necessarily will be taken in retrospect and with all due deliberation, the court will find itself in its traditional position of protecting the individual from any abuse of power.

Unquestionably, the significance of Datafin, is that it marks a further extension of the boundaries of the court's jurisdiction in cases of judicial review which springs from a desire to avoid the exercise of extensive power which is not subject to the supervision of the courts.

If that be the position of the English panel which is a non-statutory, self-regulatory body without visible means of legal support, then the position

in this country, must be a fortiori, since the Malaysian Code, unlike the London Code, is promulgated by Parliament and not therefore, as the Judge thought, a mere gentleman's agreement.

In certain circumstances, therefore, and provided always that the impugned act or decision of the panel is not caught by the privative clause contained in s. 179(8) of the Act, the panel can be subject to judicial review since it performs a public function, the source of its power is statutory and it has a duty to act judicially.

In the present case, the Judge further held that the problem he faced did not amount to a justiciable dispute as the Code had been framed in non-technical language and is considered more a gentleman's guide to self-discipline and concerned with the observance of good business standards and practices or ethics for the conduct of take-overs and mergers rather than with the enforcement of the law. In support, he cited the case of *Ganda Oil Industries Sdn. Bhd. v. Kuala Lumpur Commodity Exchange & Anor.* [1988] 1 MLJ 174.

It is true that there are no penal sanctions such as fine or imprisonment in the Code but that does not *ipso facto* mean that it is a "mere gentleman's guide" and not concerned with the enforcement of law.

The Code in Malaysia has been promulgated by the Minister concerned and gazetted as PU(B)173/1987 and has been amended once by PU(B)44/1989. It is thus clearly a piece of delegated legislation and has the force of law. The Malaysian Code, although admittedly based upon the London Code, cannot be equated with the London Code which is a wholly voluntary and self-regulatory set of rules promulgated by those involved in the mergers and acquisitions of industry in London. It is clear law that there is in cases of statutory delegation a "residual area" which is reserved for the Courts. (See *Anismanic v. Foreign Compensation Commission* [1969] 2 AC 147, per Lord Wilberforce).

Having said that, we should like to touch on the term "justiciability". The term "justiciability" is not normally defined in English public law and it is not, of course, a concept of unchanging content. However, we would mention, only in passing, and without placing undue stress on the point, that according to Black's **Law Dictionary** (5th Edn., 1983) p. 1004, "the term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.,* 249 SC 561, 155 SE 2d 618, 621".

To take the point further, the concept of justiciability requires consideration of the subject matter of the question at issue, the manner of its presentation and the appropriateness of judicial adjudication in the light of these factors. Appropriateness in this context may be determined according to both institutional and constitutional standards which in turn require consideration of both the adequacy of judicial machinery for the task as well as the legitimacy of using it. To illustrate we would refer to the following cases:

In Council of *Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at p. 411 Lord Diplock made some reference as to whether an issue is a justiciable issue or not in these terms:

> ...The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted, to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the Court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another a balancing exercise which judges by their upbringing and experience are ill qualified to perform.

And, explaining why national security is not a justiciable issue, his Lordship said this (at p. 412):

> ... National security is the responsibility of the executive government; what action is needed to protect its interests is, as the case cited by my learned friend, Lord Roskill, establish and common sense itself dictates a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves ...

Another example worth quoting may be taken from the area of university disputes. Courts have often resorted to ways to avoid determining such disputes. The favourite ground relied

upon for this attitude is to say that the dispute is a domestic one within the visitor's exclusive jurisdiction. (See, e.g. *Thorne v. University of London* [1966] 2 QB 237).

We would add that one of the great attractions of the declaration is that it is an all purpose remedy which can be used in an extraordinarily wide variety of cases. And, as the late Professor E. Borchard at p. 49 of his pioneering treatise on **Declaratory Judgments** (2nd Edn.) said one cannot talk in terms of causes of action in the strict sense because two of the main virtues of the declaratory action are to get relief before damage or to escape from dilemma and uncertainty by a clarification of the legal position.

As was aptly put by Lord Sumner, when speaking with reference to O. 15, r. 16 (equivalent to our O. 15, r. 16) in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, Ltd.* [1921] 2 AC 438, at 452 para 2:

> For many years it has been accepted practice in cases in the Commercial List to hear and determine claims for a declaration of right, when a real and not a fictitious or academic question is involved and is in being between two parties, in order that they may know what business course to take without having to run the risk of acting and finding themselves liable in damages, when at last the matter is brought before the Court. I believe this practice, as hitherto applied, to be warranted by the rules, and that the decision of the Court of Appeal to that effect in the Guaranty Trust Case was correct.

Applying the principles to be distilled from the authorities cited, to the circumstances of the present case, we have assured ourselves, for the reasons stated, that the case has a sufficiently concrete factual and legal underpinning, that the parties had the necessary *locus standi* and the incentive to adequately present the pros and cons of the issues raised in it. More particularly, the appellant had sought the ruling of the Court on a definite, concrete and existing dispute which entailed the interpretation of the law with which the Court was qualified to deal and to intervene if the decision of the panel thereon was *ultra vires* for want of jurisdiction.

The Judge, therefore, ought to have held that the issues posed by the originating summons arose directly from an existing justiciable controversy between the parties.

In any event, the Judge declined to exercise his discretion to grant the declarations sought by the appellant on the ground that the panel had not been made a party to the action. In so holding, the Judge relied on the case *Majumder v. A.G. Sarawak* [1967] 1 MLJ 101. Nor, he added, would the discretion be exercised when, as here, there is a more appropriate alternative remedy available, like certiorari as discussed and decided in *Eshah bte Sa'at* [1975] 1 MLJ 97 and *Sungei Wangi Estate v. Uni* [1975] 2 MLJ 136.

It was submitted, and we agree, that unlike the case of *Majumder v. A.G. Sarawak*, where the declaration sought would affect the rights (and financial interests) of a third party, the declaration sought here, concerned the rights and duties **not** of the panel but of the parties in this action.

On a further ground also the objection that the panel had not been made a party to the proceedings was unsustainable. We have already pointed in the preliminary part of this judgment that before commencing proceedings by way of the originating summons herein, the appellant's solicitors had by their letter dated 1 October 1991 addressed to the panel, given formal notice to the panel of their intention to commence those proceedings, yet the panel remained passive and did nothing; they made no attempt to apply to be joined as parties. A denial of the opportunity to be heard is a wrong which is personal to the party aggrieved. It follows that if such a party does not complain, it is hardly the affair of others to complain.

In any event, we are of the view that even if the panel had been made a party to these proceedings and thus been given an opportunity of being heard, it would have made no difference to the result of this appeal since the legal position of the point at issue, is clear beyond a peradventure. Indeed the House of Lords has gone so far as to say if in the Court's opinion, the hearing would have made no difference to the result, or "could only be a useless formality" (*Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578 at 1600 per Lord Simon; Lord Wilberforce at p. 1594-1595; Lord Reid at p. 1582), the denial of natural justice may be condoned. The point about an "inevitable" result had arisen again in the House of Lords in *Cheall v. APEX* [1983] 2 AC 180 when the House of Lords upheld the submission that it would have been a "cruel deception" to observe natural justice where nothing could be said that could affect the outcome.

Before we leave this topic of discretion with regard to the declaratory judgment, we would add that we had reminded ourselves of the following words of Mahoney JA in *Acs v. Anderson* [1975] 1 NSWLR 212 at 218-219:

> In the exercise of this discretion there is no simple formula or rule of thumb which will easily produce the proper result; to use a phrase adapted by Lord Radcliffe in another context, judges may not hope to arrive at a just result 'in feather-beds, it is not the way', but only by the anxious weighing of, and judgment upon, the factors involved. Nor, in my opinion, is it possible to lay down in advance that a declaration cannot be appropriate in a particular field or a particular class of case; omniscience is not an attribute which judges have or ought to aspire to, and I am conscious that, where it is said that a particular context or class of case is not the proper subject of a judicial intervention, the events have a habit of requiring the qualification of the generality.

But, we accept, as indeed we must, that decided cases still afford guidance, at the very least, as to what factors the Courts have in the past regarded as relevant when exercising their discretion as to whether to grant or refuse declaratory relief. Broadly stated, the court must weigh the advantages of granting declaratory relief as against the disadvantages. The minimum requirement must be to achieve justice between litigants and that is "a subject on which experience may teach the courts of one generation to take what they may regard as a wider or more liberal view than that of their predecessors". (See *Brickfield Properties v. Newton* [1971] 3 AER 328 at p. 335 per Sachs LJ, speaking of the rules of practice and procedure).

And, as to the question whether there is a more appropriate alternative remedy like certiorari, it is obvious that certiorari may have the effect of quashing the panel's decision, but the point would still remain, as to what the legal effect was of the public censure. In this context, the case of *Sungei Wangi Estate v. Uni (ibid)* is readily **distinguishable** because as was rightly pointed out by Counsel for the appellant, a declaration here would not result in two conflicting decisions since the panel's decision having been made outside its jurisdiction (as opposed to an error of law on the face of the record not going to jurisdiction) is a decision *void ab initio.* (per E, Abdoolcader FJ at p. 137 para G). In our view, therefore, the only appropriate remedy available to the appellant was a declaration.

Indeed, even the availability of a prerogative order will not be a sufficient ground for the dismissal of declaratory proceedings. This was plainly indicated in *Pyx Granite Co. v. Ministry of Housing and Local Government* [1960] AC 260. There Lord Goddard said, obiter, (at 290)

> I know of no authority for saying that if an order or decision can be attacked by *certiorari* the Court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is *certiorari*.

In the second place, although the Judge had expressed his view on the jurisdictional issue as aforesaid, he did go on to rule on the substantive issue as well; in other words, he did consider the merits of prayer 3 of the appellant's application, and expressed his concurrence with the opinion of the panel. This is how he put it:

> In my view, this sanction (the imposition of a public censure) at the discretion of the panel in effect wipes out the non-compliance by the parties in concert as to the general principles and rules of the Code in particular their failure to extend the mandatory offer.

Here, it would be useful to keep in the forefront of our minds, the object of the Concert Party provisions which Counsel for the appellant aptly described as the prevention of the take over of company control by stealth. More particularly, r. 34 requires any person or group of persons acting in concert who acquires shares in a company carrying more than 33% of voting rights to make a bid for all the other shares of that company at the highest price paid by the offeror for the shares in the previous twelve months. Such a percentage of the voting power is regarded as control and so the policy of the Code is to require a new controller to give an opportunity to the other shareholders of quitting the company and sharing in the price paid for the control or its consolidation because the character of the company, in a sense, may have changed.

Clearly, therefore, the purpose of r. 34.7 (which is of direct relevance to the dominant question of Law which arises for decision referred to in the opening paragraph of this judgment), is to prevent the offeror obtaining *de facto* control of

the company's board before it has implemented the mandatory bid. That purpose is achieved by, *inter alia*, freezing the shares already held in two ways, namely first, by proscribing transfers and secondly, by suspending the voting power.

To return to the substantive issue, the submissions advanced by Counsel for the appellant were twofold: first, if the imposition of a public censure has the legal effect contended for by the respondents, the whole purpose of the Code could be frustrated and circumvented by deliberate non-compliance. Secondly, it is illogical and unsatisfactory to draw the conclusion, as the panel did, that a public censure can remove the very obligation the breach of which resulted in the imposition of the public censure in the first place. For emphasis, it was further submitted that the panel's view was akin to saying that if a penalty were imposed by the Inland Revenue upon a taxpayer for not paying income tax, the obligation to pay the tax is dissolved upon paying the penalty.

With respect, we consider that the appellant's submissions on the substantive issue, are not merely difficult but impossible to rebut, and so we uphold them.

Accordingly, we have no option but to rule that the imposition by the panel of the public censure pursuant to the powers conferred upon it by s. 179(7A) have the automatic effect of releasing the Concert Parties from the obligations and restrictions imposed on them by rr. 34.1 and 34.7 of the Code; and that these obligations and restrictions continue in force unless and until the specific consent of the panel is obtained by the Concert parties under rr. 34.1 and 34.7 of the Code or until the Concert Parties comply with the direction to make a mandatory general offer.

A final point needs to be made. Towards the end of the argument before us, Counsel for the first and the second respondents, pointed out that since the proceedings in the Court below, s. 179 of the Act had been repealed, by s. 45 of the Securities Commission Act 1993 with the result that the panel does not now exist. Counsel advanced this as a ground for dismissing the appeal. This submission, of course, overlooks the saving provisions of s. 46 and the provisions of s. 47(1) and (2) of the Securities Commission Act 1993, which provide for the continuance of other rights, liabilities etc. under the repealed sections, the effect of which is that the Securities Commission steps into the shoes of the panel. There is therefore nothing in the point.

In all the circumstances, the appeal must be, and is, allowed with costs, the judgment of the Court below set aside, and we substitute, in lieu thereof, the three declarations prayed for in the appellant's originating summons. The deposit paid as security for the costs of the appeal, must be refunded to the appellant.